

Respondent initially appealed the ALJ's findings related to claimant's average weekly wage. Respondent argues the three physicians' opinions should be averaged to

find claimant has an 11 percent functional impairment to the whole body. Respondent maintains the three task loss opinions should be averaged as well, giving claimant a 50.5 percent task loss. Respondent argues claimant should have no more than an 11 percent functional impairment during those time frames claimant was not entitled to work disability benefits and no more than a 75.25 percent work disability where applicable.

Claimant contends the ALJ's Award should be affirmed. Additionally, claimant relied upon his submission brief to the ALJ, in which he states he has sustained a 15 percent functional impairment to the body as a whole and is entitled to a 79.5 percent work disability for the periods of time he was unemployed.

At oral argument before the Board, the parties stipulated claimant's applicable pre-injury average weekly wage is \$583.50.

The sole issue for the Board's review is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Respondent is a temporary employment placement agency. At the time of the accident, claimant was assigned by respondent to Heck and Wicker, a heavy equipment construction company. On July 8, 2008, claimant suffered an injury when he slipped on a large pipe. Claimant testified he felt immediate pain in his back and right hip. The owner of Heck and Wicker was on the scene and witnessed the accident. Claimant reported the injury to him directly. Claimant also reported the injury to respondent. Respondent ultimately provided claimant with medical treatment.

Claimant was initially sent to the Parsons Clinic, where he was diagnosed with lumbar and gluteal strain with radiculopathy. Claimant was treated with medication and physical therapy. An MRI of claimant's lumbar spine revealed a disc herniation to the right at L5-S1 with lesser changes at L3-4, and moderate spinal stenosis. Claimant was eventually evaluated by Dr. William Dillon, an orthopedic specialist, who recommended conservative measures and referred him to Dr. Bradley Davis, a physiatrist, for formal pain management.

Dr. Davis provided medication and injections to claimant throughout the summer and fall of 2008. Dr. Davis released claimant from his care in July 2009, though he continued to provide medication. Claimant did not see Dr. Davis again until November 2010, when he returned and complained his back would go out and his right thigh cramped. Dr. Davis provided claimant with medication and anti-inflammatories, but did not impose restrictions.

Dr. Peter V. Bieri, a physician and board certified disability evaluator, first examined claimant on April 12, 2011, at his counsel's request, to determine whether additional

treatment was necessary. Claimant presented with constant low back pain, pain radiating down into the right lower extremity, and numbness and tingling into the toes. Dr. Bieri reviewed claimant's medical records and history, performed a physical examination, and noted findings consistent with disc herniation at two levels and right lower extremity radiculopathy.¹ Dr. Bieri recommended further evaluation "in the form of surgical consultation as well as issued temporary restrictions based on the physical examination."² Claimant was placed on temporary restrictions consistent with a light physical demand level. Dr. Bieri opined claimant's condition was directly attributable to the July 8, 2008, injury.

Dr. Thomas L. Shriwise, a board certified orthopedic surgeon, performed a court-ordered independent medical evaluation on August 11, 2011, for purposes of a diagnosis and treatment recommendations. After reviewing claimant's medical records and performing a physical examination, Dr. Shriwise diagnosed claimant with preexisting lumbar degenerative disc disease, with possible exacerbation of the L5-S1 disc. Dr. Shriwise indicated claimant's main concern was to the right hip joint, which could be secondary to the exacerbating back injury, and therefore recommended an MRI for a possible labral tear. The MRI, taken September 1, 2011, revealed a small area of contusion or edema along the posterior column of the right acetabulum but was negative for a labral tear. Dr. Shriwise imposed temporary restrictions before releasing claimant to full duty on September 14, 2011.

Claimant returned to Dr. Shriwise on November 3, 2011, approximately one month after receiving a steroid injection to the right hip. Dr. Shriwise again performed a physical examination and determined claimant was at maximum medical improvement relative to the July 2008 work injury. Dr. Shriwise indicated claimant required ongoing pain management and may benefit from occasional epidural steroid injections or intra-articular injections into the right hip joint. He imposed permanent restrictions of no lifting over 50 pounds and no repetitive bending.

Dr. Shriwise reviewed a task list generated by Mr. Steve Benjamin, a vocational expert. Of the 39 unduplicated tasks on the list, Dr. Shriwise opined claimant was unable to perform 14 for a 36 percent task loss.

Dr. Shriwise's final diagnosis was a deep bone contusion to the right hip. Using the *AMA Guides*,³ Dr. Shriwise assessed a one percent functional impairment to the body as a whole at the level of the hip. During his deposition, Dr. Shriwise amended his impairment

¹ Bieri Depo., Ex. 3 at 4.

² Bieri Depo. at 9.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

rating to include a five percent impairment to the body as a whole based upon the lumbar spine, half of which was a preexisting impairment. These impairment ratings combine to provide a 3.5 percent impairment to the body as a whole.

Claimant returned to Dr. Bieri on January 16, 2012, again at the request of his counsel. Claimant indicated no significant change in symptomatology. Dr. Bieri determined claimant was at maximum medical improvement, though he opined claimant would require ongoing pain management and imposed permanent restrictions of light-medium physical duty. Using the *AMA Guides*, Dr. Bieri assessed a 10 percent impairment to the whole person based on DRE Lumbrosacral Category III, and a 15 percent impairment to the right lower extremity, which translates to a 6 percent impairment to the whole person. Dr. Bieri combined the impairments to arrive at a 15 percent functional impairment to the whole person.

Dr. Edward J. Prostic, a board certified orthopedic surgeon, examined claimant at his counsel's request on December 17, 2012. Claimant presented with "frequent difficulties from his low back to his posterior right thigh and calf with cramps."⁴ After reviewing claimant's medical records and history and performing a physical examination, Dr. Prostic diagnosed multiple level central spinal stenosis and a disc protrusion. He stated claimant also has an S1 radiculopathy from one of the stenosis levels. Dr. Prostic opined claimant's difficulties were caused or contributed to by the work he performed at respondent. Moreover, Dr. Prostic indicated claimant will need ongoing medical care as prescribed by Dr. Davis and will likely require surgery at some point.

Using the *AMA Guides*, Dr. Prostic assessed a 15 percent functional impairment of the body as a whole as a result of claimant's injury. He recommended medium-level employment with "avoidance of frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment, or captive positioning."⁵

Karen Terrill, a vocational expert, interviewed claimant via telephone at his counsel's request on March 14, 2012. Ms. Terrill compiled a list of 63 unduplicated job tasks claimant had performed in the 15-year period prior to his accident of July 8, 2008. Dr. Bieri reviewed Ms. Terrill's task list, and after applying his restrictions, opined claimant was unable to perform 37 for a 59 percent task loss. Dr. Prostic also applied his restrictions to Ms. Terrill's list, and determined claimant was unable to perform at least 36 of the 63 unduplicated tasks on the list for a 57 percent task loss.⁶ Dr. Shriwise reviewed the task

⁴ Prostic Depo., Ex. 1 at 2.

⁵ *Id.* at 3.

⁶ Dr. Prostic opined claimant was unable to perform Task 33 of Ms. Terrill's list, originally producing a task loss of 59 percent. He explained claimant could perform said task dependent on claimant's additional work activities. The ALJ adopted Dr. Prostic's opinion of 57 percent task loss in his October 11, 2013, Award.

list prepared by Karen Terrill and opined claimant was unable to perform 22 for a 35 percent task loss.

On June 6, 2012, Steve Benjamin, also a vocational expert, interviewed claimant via telephone at respondent's request. Mr. Benjamin generated a report on September 17, 2012, in which he identified 49 unduplicated job tasks claimant performed in the 15-year period prior to his 2008 work accident. Dr. Shriwise reviewed the list prepared by Mr. Benjamin and opined claimant was unable to perform 14 for a 29 percent task loss.

Claimant worked for respondent until May 28, 2010. He was unemployed until he began work with Tank Connections in Parsons, Kansas, on May 2, 2011. Claimant was physically able to perform this job and did not suffer any new injuries during his employment. Claimant worked for Tank Connections until April 20, 2012, when he was again unemployed. On July 8, 2012, claimant began employment with Consolidated Construction, where he remained until he was laid off on December 28, 2012. Claimant is currently unemployed.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part:

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2008 Supp. 44-508(g) defines "burden of proof" as follows:

'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

K.A.R. 51-7-8 (c)(3) states, "An injury involving the hip joint shall be computed on the basis of disability to the body as a whole."

ANALYSIS

In its brief, which was simply a copy of its Submittal Brief to the ALJ, respondent asked the ALJ and the Board to average the three impairments provided by Drs. Prostic, Bieri and Shriwise and find an 11 percent functional impairment. In the Award, the ALJ found claimant suffers an 11 percent impairment based upon a split of the 3 ratings. Respondent received exactly what it requested in this regard.

Respondent also argues in its submittal letter the ALJ should average the task loss percentages assigned by the three physicians. Respondent noted task loss percentages of 59 percent, 58 percent, and 35.5 percent. Respondent requested a finding of no more than a 50.5 percent task loss. The ALJ found claimant had a 50 percent task loss, slightly less than that proposed by respondent. Again, respondent essentially received what it requested.

Because the award issued by the ALJ comported with the arguments made by respondent prior to the regular hearing and in respondent's brief to the Board, there is no reason to analyze these issues any further.

At the oral argument before the Board, respondent, for the first time, argued that claimant suffered only a scheduled injury to the hip, not a whole body impairment. This position is inconsistent with K.A.R. 51-7-8 (c)(3), which says an injury to the hip joint is a whole body injury. This argument was not raised before the ALJ and will not be considered by the Board. Also, in addition to the hip impairment, claimant has a whole body impairment associated with his low back as a result of his accidental injury.

The Board has frequently declined to exercise de novo review when an issue was not raised by the parties and limited review to "questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."⁷ The Board, citing *Scammahorn*,⁸ has frequently held that under K.S.A. 2008 Supp. 44-555c, issues not raised before the judge cannot be raised for the first time on appeal.⁹

CONCLUSION

Claimant suffers a 75 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated October 11, 2013, is affirmed.

⁷ See K.S.A. 2008 Supp. 44-555c(a); *Byers v. Acme Foundry*, No. 1,056,474, 2013 WL 6382905 (Kan. WCAB Nov. 21, 2013); *Miller v. General Motors Corp.*, Nos. 1,048,350 & 1,048,351, 2013 WL 1384377 & 2013 WL 1384378 (Kan. WCAB Mar. 13, 2013).

⁸ *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 415, 416 P.2d 771 (1966).

⁹ See *Miller v. General Motors Corp.*, Nos. 1,048,350 & 1,048,351, 2013 WL 1384377 & 2013 WL 1384378 (Kan. WCAB Mar. 13, 2013); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

IT IS SO ORDERED.

Dated this _____ day of March 2014.

BOARD MEMBER

BOARD MEMBER

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